any participation in the moveable estate ever competent to the spouses by our law. It is to the effect of comprehending these rights, and to no other effect whatever, that the phrase *communio bonorum* can ever be legitimately employed. If indicating anything more, the phrase has been illegitimately used. It has been reasonably suggested that the phrase came to be employed as a supposed philosophic exponent of the rights arising at dissolution; and that, so far from a *communio bonorum* giving rise to the rights emerging at dissolution, it was the existence of these rights which brought the phrase *communio bonorum* into use. At all events, nothing else was ever legally comprehended under that name except the two rights referred to. *Communio bonorum*, in the law of Scotland, means these two rights and nothing else.

What, then, can the pursuer claim in respect of either of these two rights, in the circumstances of the present case?

In regard to the right competent to a wife on the dissolution of the marriage by her own predecease, to transmit one-half of the moveables to her representatives, the right was finally abrogated and taken away by the Act 18 Vict., cap. 23. By the 6th section of that statute it was enacted, "When a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy, or bequest, or testamentary disposition thereof by such wife affect or attach to the said goods or any portion thereof." It is now out of the question to refer to this right on the part of a wife as arising out of the so called *communio bonorum*, or to rest any claims on its assumed existence. No such claim now exists. This one of the only two rights ever held by a wife under the name of *communio bonorum*, has been unknown to the law since the date of the statute on 25th May 1855.

The result is, that no right is capable of being claimed on the ground of the so-called *communio bonorum*, except the other of these two rights, viz., the *jus relictæ*. When the case is thus reduced to its legal points, I think it clear that all the claim by the pursuer at once falls to the ground. I cannot regard the *jus relictæ* as anything else than the right held by a widow over a certain part of her deceased husband's estate. It is the widow's provision out of that estate. The pursuer cannot claim this provision. She is not Mr Walker's widow. In place of surviving him, she is constructively dead, and his own guilt does not re-vivify her, but only makes him partner in her decease. The claim, at any rate, is one arising out of the marriage against the husband's estate. It is forfeited by her adultery. Her husband's adultery may forfeit any claim made by him. But it cannot re-habilitate her.

I think the argument of the pursuer, founded on the alleged *communio bonorum*, fails thus at all points. It is at best an argument founded on mere words, and is only successful on a *petitio principii*. The pursuer takes the words *communio bonorum*, and assumes that they imply a true and real partnership existing during the subsistence of the marriage, and she thence infers that the dissolution of the marriage, however or whensoever brought about, gives the wife one-half of the effects as her own. The law contains no such doctrine, nor any in the least supporting the claim by the pursuer. No such thing is known to our law as a division of the moveable estate of the two spouses when both are alive, which is what the pursuer demands. The law once gave a right against the husband's estate to the representatives of a predeceasing wife. It gives that right no longer. And besides this, the present claim is not by the representatives of a predeceasing wife, but by a living wife herself, a claim which never was known to the law. It still gives a surviving widow her *jus relictæ*. But the pursuer is not a surviving widow. She is a simultaneous adulteress, claiming during her life a right of participation in her husband's estate. And this, again, is a right such as the law never knew.

I have thought it necessary to go so far into this subject, because we have two Lords Ordinary expressing opinions directly opposed to each other in regard to this very matter of the *communio bonorum*, considered in its application to the present case. I think it right to state the special grounds on which I think the one of these Lords Ordinary right, and the other wrong. But I revert in the close to what I said in the opening: that it is enough to dispose of the pursuer's claim that it is a claim for something which arose to her out of the marriage, and for nothing else, and this her adultery has forfeited.

I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

The Court adhered, and found no expenses due to either party.

Agents for Mrs Fraser—J. B. Douglas & Smith, W.S.

Agent for Mr Walker—W. G. Roy, S.S.C.

Friday, June 21.

LIGERTWOOD *v.* BROWN.

Triennial Limitation—Act 1579, *c.* 83—*Aliment—Bastard.*

The claim against the father of a bastard child for arrears of aliment, furnished by a stranger in circumstances which implied a contract between him and the father, *held* to fall under the triennial limitation.

This was an appeal from the Sheriff-court of Aberdeen.

On 14th September 1871 George Ligertwood, shoemaker, Ythan Bank, Ellon, raised an action against John Brown, farmer, Aquorthies, Tarves. The summons concluded for payment of £26 sterling, being the amount of aliment due to the pursuer by the defender, after giving deductions for the payments made by him to account, for aliment and maintenance of a female child, given birth to by Ann Lewas, on the 24th day of June 1850, (of which child the defender is the father), from the 19th September 1851 to the 24th June 1860, when the said child arrived at ten years of age; and also of £19, 5s. 9d., being the interest on the said arrears of aliment to 13th September 1871.

The minute of defence was as follows:—"The defender's procurator stated that the defence was a denial of being due the sums sued for, and prescription. That the defender never contracted with the pursuer to keep the child in question, and never agreed to pay him for doing so, but, on

the contrary, arranged, in manner after mentioned, to keep the child himself after it should have attained the age of seven years, and that after the child had attained that age the defender was prevented from getting the custody of the child through the pursuer and his wife refusing to give it up, in consequence of having contracted an affection for the child. That the pursuer, even although the alleged claim should not be prescribed, having allowed eleven years to elapse without any intimation of his claim, or demanding payment of it, is now barred by *mora* from pursuing it, and more especially from interest on it. Explained, that shortly after the birth of the child, Ann Lewas, its mother, applied to the deceased George Melvin, then inspector of poor of the parish of Tarves, who made an application to the defender for aliment of the child. That, in consequence of the defender having at the time two other illegitimate children to support, and being then in poor circumstances, Mr Melvin agreed with him that he should pay for the child at the rate of £2 sterling per annum till it should attain seven years, and then take the child and maintain it himself. That, in terms of said agreement, the defender did pay, either to the mother of the child, or to those authorised by her, to the extent of £14, and on the expiry of the seven years repeatedly expressed his willingness to receive and maintain the child, but that the pursuer and his wife always declined to part with the child. That from the time the child attained seven years till Whitsunday 1871, being a period of nearly fifteen years or so, the defender never received any intimation of any claim beyond the original period agreed on, and it is entirely an after thought on the part of the pursuer, with whom the defender has nothing to do. The defender craves to be assoilzied, with expenses."

The Sheriff-Substitute (DOVE WILSON), on 10th November 1871, sustained the plea of prescription, and assoilzied the defender with expenses.

"*Note.*—The claim founded on is, in a question between the pursuer and the defender, merely an ordinary claim for board. Whatever may be the case in a question between the pursuer and the minor, or between the minor's mother and the defender, the pursuer has no claim against the defender, except what he could maintain on contract, express or implied. The case therefore falls under the triennial prescription. *Taylor* v. *Allardyce*, Jan. 16, 1858, 20 D. 401.

On appeal, the Sheriff (GUTHRIE SMITH) adhered, adding the following

"*Note.*—When the aliment is furnished to a minor by a stranger, without paction—for instance, a foundling, or a child deserted by its parents—the case does not fall under the triennial prescription, it being of the nature of a *negotiorum gestio*, for which a claim lies whenever the true debtor can be found; but, in this case, the child was apparently taken charge of by the pursuer under an arrangement to which one or other of the parents was a party; for the summons gives credit for periodical payments made to account of aliment for a long series of years. The case founded on by the Sheriff-Substitute therefore applies, and the plea of prescription has been properly sustained."

The pursuer appealed to the Court of Session.

SCOTT, for him,—after a statement that the facts of the case were peculiar, the child being left with the pursuer and his wife under circumstances in which they had no option but to support the child, —argued that the triennial limitation does not apply to a claim of this kind. It was not a claim upon contract,—it was part of the defender's case that there was no contract,—but a claim arising from the mere fact of the pursuer having alimented the child, and of the defender being the father; *Matheson*, Dec. 23, 1831, 4 Scot. Jur. 212. It has been expressly decided that claims by the mother of a bastard child against the father for arrears of its aliment are not cut off by the triennial limitation; *Thom* v. *Jardine*, June 24, 1836, 14 S. 1004 (see Lord Fullerton's Note); and other cases cited by Dickson on Evidence, § 489.

LORD PRESIDENT—The father and mother are co-obligants. The claim in that case is one for relief.

SCOTT—It was held by the House of Lords in *Davidson* v. *Watson*, Dec. 4, 1740, Cr. and St. 288, that the limitation does not apply to the aliment of a minor.

In the case of *Macdowall* v. *Maclurg*, Feb. 19. 1807, F.C., and M. "Prescription," App. No. 6, it was held that the triennial limitation was not pleadable against the maternal grandmother of a bastard child, with whom it had been left. That case was identical with the present.

JAMESON in reply.

At advising—

LORD ARDMILLAN—The question raised here in regard to the application of the triennial prescription or limitation of action is one of some interest, and not without difficulty. I had occasion to consider this same question in the case of *Taylor* v. *Allardice*, 16th January 1858, 20 D. p. 401; and having now heard it again fully argued, I am confirmed in the opinion which I then expressed.

This action is brought in the Sheriff Court of Aberdeenshire for payment to the pursuer of sums advanced by him for aliment and maintenance of an illegitimate child, said to be, and not denied to be, a child of the defender. The defender maintains the plea of triennial prescription, in respect that the period during which the advances are said to have been made is stated in the summons as from 19th September 1851 to 24th June 1860.

The first question to be disposed of in dealing with the plea of prescription is, On what footing is it alleged that these advances were made? The application of the statute must depend on the pursuer's averments.

The pursuer was under no natural obligation to support the child. The advances were not made *ex debito naturali*, nor were the advances made as a donation, or out of mere charity. Then it is stated in the summons that payments were made by the defender to account, and the action is brought for the amount of advance under deduction of such payments. Looking to these circumstances appearing on the face of the summons, it appears to me clear that the obligation on the part of the defender, which the pursuer alleges, and is seeking to enforce, must be viewed as arising *ex contractu*, if arising at all. It is in this that we perceive the distinction between an action for aliment of an illegitimate child brought by the mother against the alleged father, and such an action as the present, brought by a party who alleges that he made advances to support the child. The action at the mother's instance is for rateable or proportional contribution, and against such an action the plea of triennial prescription cannot be urged. This

is settled. Then the advance of aliment to a child, where the father is not known, may be of the nature of *negotiorum gestio*. But this action can have no other foundation than contract, express or implied.

I think it is quite settled that the triennial prescription introduced by the Act 1579, cap. 83, is applicable to an action for repayment of aliment, whether the aliment be advanced to the defender, or to the defender's child or other relative, if only it has been advanced on contract, express (but not written) or implied with the defender. This was my opinion in the case of *Taylor* v. *Allardice*, and I adhere to that opinion, and need not again repeat the citation of authorities which I then made, and which I have reconsidered. If this pursuer did not make these advances on any contract, express or implied, with the defender, he can have no action against the defender; for he has alleged no other foundation for his action than an arrangement, or, in other words, a contract. If he did make the advances under contract (not written), express or implied, with the defender, then the limitation of the statute applies. The claim by the mother is clearly distinguishable. There is not here, as the Sheriff points out, a *negotiorum gestio*. There is here no charitable advance for a deserted child, when the father was unknown and is subsequently discovered. The case here is plainly stated as one of arrangement or contract creating consensual liability. After the lapse of ten years from the last date of the alleged advances, it seems to me impossible to exclude the application of the triennial prescription.

The effect of the statute is just to limit the mode of proof, and the pursuer, having no other ground of action but contract, must be limited to that mode of proof which the statute permits.

I think that the Sheriff has rightly disposed of the case, and on the right ground.

Lord Deas concurred.

Lord Kinloch—The present action has been brought for payment of a sum of £26, alleged to be due, with interest, to the pursuer by the defender, for aliment supplied, from 19th September 1851, to a natural child of whom the defender is father. The amount is concluded for against the defender, as the summons expressly bears, "after giving deduction for the payments made by him to account." In the account annexed to the summons these payments to account are set forth; and they run over a period of years, from 1851 to 1858. One payment was made in 1852; two in 1853; two in 1854; one in 1855; one in 1856; two in 1858.

It is thus shown by the pursuer's own summons that the aliment was afforded to the defender's child on full communication with the defender, and with his acquiescence and consent. The alimentary debt, if due at all, must be held due on implied contract with the defender. For if a man knows that another is supplying aliment to his natural child, sanctions his doing so, and makes payments from time to time to account, he must be held, by implication, to have contracted to pay the amount agreed on; or, if no amount has been agreed on, a fair and reasonable sum for aliment.

The question now arises, whether the triennial prescription of the Act 1579, c. 83, is applicable to this claim.

The statute, by its express terms, makes the prescription applicable to "men's ordinars, and other the like debts, that are not founded on written obligations." It has been determined by a series of decisions, that under this description are comprehended alimentary debts generally, at least such as arise out of contract, express or implied. The terms employed in the statute would seem to point primarily at tavern bills, and the like. But the reason of the case extended the doctrine to the case of all aliment, however or by whomsoever supplied. The debt thus incurred is just such as may be reasonably presumed settled periodically, as incurred; and as to which formal vouchers of payment might often not be taken. It was thus just one of the debts which the statute had especially in view. Without referring to more ancient cases, I may instance that of *Thomson* v. *Lord Duncan*, 13th December 1808, Hume, p. 466, where the prescription was applied to a claim by the master of an academy for the board of a son of Lord Duncan, placed by his father in his charge; and where, as here, Lord Duncan had made partial payments from time to time, leaving an alleged balance due at his death. In the case mentioned by the Sheriff, of *Taylor* v. *Allardice*, 16th January 1858, 20 D. 401, Lord Ardmillan, applying, and I think rightly applying, the previous decisions, found the prescription applicable where the claim was by a teacher of an industrial school for the aliment of a daughter placed in the school by her father. It is scarcely necessary to say that if the prescription applies to aliment furnished to a man's self, it must equally apply to aliment furnished to his child on his contract, express or implied. So these decisions found.

This consideration appears to me to be sufficient for the decision of the present case. For the aliment, as I view it, was supplied to the defender's child, on his implied contract with the defender, and so was an alimentary debt due by the defender on contract. If the aliment had been supplied to the defender himself, I cannot doubt of the claim being exposed to the operation of the triennial prescription. But that it was supplied to the defender's child makes no difference in principle.

This conclusion is not affected by the circumstance that various cases appear in the books, in which the claims by the mother of a natural child against the father have been found not affectable by the triennial prescription. It was so decided in, amongst other cases, *Thom* v. *Jardine*, 24th June 1836, 14 S. 1004, and *Thomson* v. *Westwood*, 26th February 1842, 4 D. 833. But in such cases the claim is not properly a claim by a creditor in an alimentary debt. It is a claim of relief by one against another of two parties, both of whom are liable to aliment their common child. The mother, as much as the father, is liable for such aliment; and in her action against him she concludes for the excess beyond her proper share. The debt, therefore, does not come within the category of an alimentary debt, but within the wholly different category of a claim of relief from payment of what is another party's debt. To such a claim the triennial prescription does not apply. None of the reasons on which the triennial prescription rests are applicable to the case. Suppose that a third party pays to the mother the father's share of aliment, and then sues the father for relief of the sum so

paid. It is admitted that in such a case the triennial prescription could not be set up against the claim. But it is as little applicable to the claim of relief insisted in by the mother herself.

Another class of cases appears on the books, which is perhaps open to more controversy. One of these is the case of *Macdonald* v. *Maclurg*, 19th February 1807, M. App., "Prescription," No. 6, in which aliment was afforded, without contract, to a natural child whose father had left the country and gone to Jamaica; and the plea of the triennial prescription was repelled. Another is a prior case of *Davidson* v. *Watson*, 16th November 1739, Mor. 11,077, in which a stepfather had alimented a child of his wife by her previous husband; and although the plea of the triennial prescription stated by her heir was sustained by this Court, the judgment was reversed on appeal. A third, of a somewhat similar character, though involved in specialties, is *Butchart* v. *Scott*, 28th June 1839, D. 1, 1128. From these cases some have been disposed to draw the general conclusion, that wherever no contract express or implied, has intervened, but aliment is pursued for as arising *ex debito naturali*, and as supplied in the character of *negotiorum gestio*, the triennial prescription is inapplicable. I do not think the Court now called on absolutely to decide the question. It appears very consistent with equity that prescription should not hold good where the debtor is out of the country, or is a child; but I am not aware that any limitation on that account has been sanctioned by the law. There are many reasons why, if the father be well known, and within reach, a claim *ex debito naturali* should be prosecuted as expeditiously as where it lies on contract, and the same prescription should apply. But the present is different from all such cases. The claim lies, as I think, on clearly implied contract. And, whatever may be held in these other cases, I think the law, in the present case, applies the triennial prescription.

I am therefore of opinion that the judgment of the Sheriff is right, and ought to be affirmed. But his Lordship is perhaps precipitate in *de plano* pronouncing judgment of absolvitor. The prescription only operated *quoad modum probandi*, and to exclude parole evidence; and the pursuer should have the opportunity of making good his claim by writ or oath.

LORD PRESIDENT concurred.

The Court refused the appeal, and remitted to the Sheriff to sustain a reference to oath, if offered.

Agent for Pursuer—Wm. S. Stuart, S.S.C.
Agent for Defender—John Auld, W.S.

Friday, June 21.

SECOND DIVISION.

LORD ADVOCATE *v.* THOMSON.

Teinds—Officers of State—Res Judicata.

Certain teinds having been found by an interlocutor of the Lord Ordinary, in a process of locality, to be "college teinds" and therefore entitled to have their liability for stipend postponed to that of the bishops' teinds held by the Crown, which interlocutor was for upwards of fifty years acquiesced in by all parties, and the Crown having been a party to that process, although not immediately interested, *held* that it was *res judicata* that the teinds in question were college teinds, and that the question whether they truly belonged to that class or not could not again be competently discussed.

This question arose in the locality of the parish of Cameron, St Andrews, and related to the order of allocation of different classes of teinds in that parish. Prior to 1866 it had not been necessary to allocate any part of the stipend, either on bishop's teinds or college teinds, but an augmentation having been awarded in that year, and the other teinds having been exhausted, it became necessary that these privileged teinds should be localled upon. In the interim scheme of locality the teinds of the lands of Lambieletham and Carngours, belonging to Mr Anstruther Thomson of Charleton, having been stated as bishops' teinds, and localled upon *pari passu* with the other bishops' teinds in the parish, Mr Thomson lodged objections, on the ground that the teinds of his lands were not bishops' but college teinds, and therefore entitled to postponement.

The Lord Ordinary on Teinds (GIFFORD) pronounced the following interlocutor, which, with the Note appended, fully explains the circumstances of the case:—

"*Edinburgh, 12th March* 1872.—The Lord Ordinary sustains the first plea in law stated for Mr Thomson, the objector, and finds, in terms thereof, that it is *res judicata* that the teinds of the objector's lands of Lambieletham and Carngours were in 1810 college teinds: Finds, in accordance with the final interlocutor pronounced by Lord Woodhouselee on 23d January 1810, that the teinds of the objector's said lands then belonged to the College of St Leonard's, one of the Colleges of St Andrews: Finds that it is not averred or offered to be shown that since the date of that judgment the teinds of the objector's said lands have ceased to be college teinds, or have in any way changed their character or position; and finds that the said teinds are still college teinds, and entitled to all the privileges belonging to such teinds in allocation and otherwise: Therefore sustains the objections for the said John Anstruther Thomson, to the effect that the teinds of his lands of Lambieletham and Carngours must be postponed in the order of allocation for stipend, not only to teinds held upon heritable rights, but also to bishop's teinds in the hands of the Crown, and remits to the clerk to rectify the locality accordingly, and decerns, etc.

"*Note.*—The question raised in the present record is very important, and the Lord Ordinary has found it to be attended with considerable difficulty. It relates to the order of allocation of the various classes of teinds in the parish of Cameron, and to the effect to be given to judgments pronounced in various processes of locality of the teinds of the said parish.

"The present process of locality commenced with a decree of augmentation and modification, dated 5th December 1866. Until this last augmentation was granted, the whole stipends have been paid from teinds either held upon heritable right, or to which no rights at all have been produced. Hitherto, that is, prior to 1866, it has not been found necessary to allocate any part of the stipend either upon bishop's teinds or upon college teinds, both of which exist in the parish.

"The augmentation of 1866, however, more than